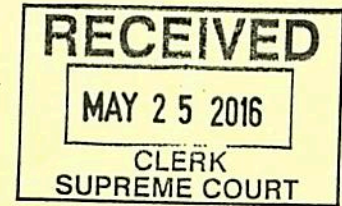


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000180-DR



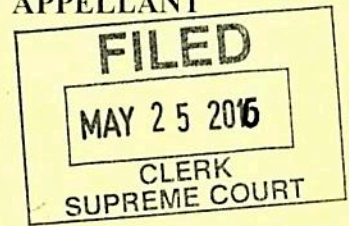
DARRYL M. SAMUELS

APPELLANT

APPEAL FROM COURT OF APPEALS
NO. 2012-CA-000341

v.

APPEAL FROM MCCrackEN CIRCUIT COURT
HON. CRAIG Z. CLYMER, JUDGE
NO. 2008-CR-00377



COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT DARRYL M. SAMUELS

SUBMITTED BY:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The Undersigned does hereby certify that copies of this Reply brief were served upon the following named individuals by mail, first class postage prepaid, on May 23, 2016: Hon. Craig Zeiss Clymer, Judge, McCracken County Courthouse, 301 S. Sixth Street, Paducah, Kentucky 42003; Hon. Seth A. Hancock, Assistant Commonwealth's Attorney, McCracken County Courthouse, Paducah, Kentucky 42003-1794; Hon. Wesley K. Boyarski, Assistant Public Advocate, Department of Public Advocacy, 503 North 16th Street, Murray, Kentucky 42071; the Hon. Andy Beshear, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601 and the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

BRANDON NEIL JEWELL

PURPOSE

The purpose of this Reply Brief is to respond to argumentation, legal authority, and analysis contained in the Attorney General's Brief (hereinafter "AG Brief" with the page number referenced immediately following). If Mr. Samuels chooses not to respond to a particular point or argument, this means he reasserts the arguments made in his Opening Brief.

ARGUMENT

A conflict warranting reversal occurred when a DPA attorney in a local DPA trial office represented a defendant in a criminal case while another DPA attorney in the same local DPA trial office represented the alleged victim in that same case on other criminal charges.

The Court of Appeals panel concluded that the interests of Mr. Samuels and Mr. Gravett were adverse enough to one another that a single lawyer could not have permissibly represented both at the same time and that there was simultaneous representation in this case. The question then became whether a conflict was imputed to the two attorneys from the same DPA trial office representing Mr. Samuels and Mr. Gravett. COA Opinion, pg. 13-14. The Attorney General does not appear to make an argument that, under these findings, a conflict should not be imputed to the two attorneys. Rather, the Attorney General seems to argue that the Court of Appeals' findings were not correct, without explicitly saying such, and while seemingly accepting such findings as true by claiming that the "Court of Appeals opinion that affirmed the trial court's ruling was also correct." AG Brief, pg. 12.

The Court of Appeals panel used the correct standard:

The Attorney General seems to confuse the prejudice resulting from a conflict with the conflict itself and addresses the existence of a conflict in this manner, just as the Attorney General incorrectly did in Beard v. Commonwealth, 302 S.W.3d 643, 647 (2010). In the case at bar, the Attorney General seems to imply that Mr. Samuels was required to show an actual conflict that adversely affected counsel's performance. Such is not true. "Because [Mr. Samuels] raised the issue at trial, the proper inquiry then is whether Appellant raised an actual conflict at trial, **not whether he was prejudiced by [his attorney's] representation of other defendants.**" Beard, 302 S.W.3d at 647.

When speaking of such conflicts, the Beard Court stated:

A conflict arises from competing duties or interests that create the *potential* for prejudice. The conflict does not come into being only when the potential turns into actual prejudice; it exists from the instant that inconsistent duties or interests arise. Thus, a conflict of interests is generally thought of as both "[a] real or *seeming* incompatibility between the interests of two of a lawyer's clients...." *Blacks Law Dictionary* 318 (8th ed. 2004) (emphasis added). Actual prejudice is not necessary for the conflict to exist.

Beard, 302 S.W.3d at 647. The Court of Appeals panel in the case at bar used the correct standard found in Beard. See COA Opinion, pg. 7-9.

The Attorney General omitted the bolded portion of the aforementioned quote when quoting Beard in his brief and stated that "an 'actual conflict' is a conflict of interest that adversely affects a lawyer's performance. AG Brief, pg. 12 citing Mickens v. Taylor, 535 U.S. 162, 172 (2001). This is misleading because, in Mickens, a different standard was applied because the issue was not raised at trial, but rather, was raised after the petitioner's federal habeas counsel learned that the petitioner's lead trial counsel had represented the petitioner's murder victim prior to representing the

petitioner. Id. at 164-165. In the case at bar, Mr. Samuels raised the issue before trial, and thus no prejudice needs to be shown.

The Attorney General further says that the attorneys in the case at bar indicated that they did not feel conflicted. AG Brief, pg. 10-11, 14. Such is irrelevant. In Beard, after the defendant filed a pro se motion alleging a conflict, the trial attorney in that case indicated prior to trial that he saw no conflict, and this Court still reversed based on the correct, aforementioned standard for reversal. Beard, 302 S.W.3d at 644-645. Moreover, in the case at bar, unlike in Beard, the trial attorney thought the conflict was serious enough that she raised it prior to trial. VR: 5/20/09; 8:45:30. It does not matter what she said after the fact. Furthermore, as in Beard, the defendant in the case at bar himself objected to such representation and continues to.¹ Id., Beard, 302 S.W.3d at 644.

The Court of Appeals panel correctly found there was a conflict between interests in this case:

The Attorney General seems to alternatively argue that there was not even a conflict under any applicable standard. AG Brief, pg. 14 (“there was nothing ‘directly adverse’”). However, as the Court of Appeals panel concluded, and as explained in greater detail in the Opening Brief, “there are few interests more adverse in the criminal justice system than those of the accused and the victim.” COA Opinion, pg. 12, see also Opening Brief, pg. 6 and n. 9. This was especially true in the present case where the defendant was claiming self-defense against the alleged victim, both of whom were represented by the same DPA trial office. Id.

The Court of Appeals panel correctly found that there was simultaneous representation in this case:

¹ Under the Section 11 of the Kentucky Constitution, “the accused has the right to be heard by himself and counsel.”

The Attorney General also seems to argue that the same DPA trial office did not provide simultaneous representation to Mr. Samuels and the alleged victim, Gravett. AG Brief, pg. 14-16. This argument was easily dismissed by the Court of Appeals panel, as it should have been. As the panel stated, “[i]f an actual conflict existed during the critical investigatory phase of Samuels’s trial, it could not have been erased by the mere fact that the simultaneous representation ceased on the eve of trial.” COA Opinion, pg. 9 citing State v. Watson, 620 N.W.2d 233, 240 (Iowa 2000). The Paducah DPA trial office’s representation of Gravett began on April 20, 2007 and continued on and off until it was continuous from January 9, 2009 to May 12, 2009, eight days before Mr. Samuels’ trial, and representation of Mr. Samuels began on July 3, 2008 in another case and began on September 12, 2008 in the instant case and lasted throughout his trial and sentencing.² The right to counsel attaches long before trial. It “attaches during ‘the initiation of adversary judicial criminal proceedings.’” COA Opinion, pg. 9-10 quoting Montejo v. Lousiana, 556 U.S. 778, 802 (2009) (quoting Rothgery v. Gillespie County, 554 U.S. 191 (2008)). Again, if a conflict existed during the pretrial period, it could not be remedied by ceasing dual representation immediately prior to trial. COA Opinion, pg. 10.

Reversal is required:

There was a conflict of interest in this case between Mr. Samuels and Mr. Gravett. The same attorney could not simultaneously represent both. However, Mr. Samuels and Mr. Gravett were simultaneously represented by attorneys in the same local DPA trial office. As asserted in his Opening Brief, this constituted a conflict warranting reversal. Even if the Attorney General’s contentions that reversal is not required under Halloway

² The Attorney General incorrectly says that Gravett’s DPA representation ended on 5/8/09. AG Brief, pg. 16.

and Beard had merit, reversal is still required under Section 11 of the Kentucky Constitution which guarantees an accused the right to counsel and requires that an accused cannot be deprived of liberty unless by law of the land. As explained in the Opening Brief and herein, Mr. Samuels was deprived of his right to counsel and his liberty in violation of the law of the land under the state and federal ethical rules and principles and the state and federal case law cited in the Opening Brief and herein.

CONCLUSION

For the reasons stated in the Opening Brief and herein, this case must be reversed and remanded to the McCracken Circuit Court for a new trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Brandon Neil Jewell', is written over a horizontal line.

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